

United States Courts
Southern District of Texas
FILED

APR 19 2019

David J. Bradley, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PENA § CASE NO: _____
PLAINTIFF §
V. § JURY TRIAL ____ YES X NO
JAMES DUSTIN PAYSEUR AND §
BAYONET RECORDS LLC, A NEW §
YORK LIMITED §
LIABILITY COMPANY §
DEFENDANTS §

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW John Pena, Plaintiff, (hereinafter referred to as "Pena") appearing and complaining of James Dustin Payseur, (hereinafter referred to as "Payseur") and Bayonet Records LLC, a New York Limited Liability Company, (hereinafter referred to as "Bayonet Records") and shows this Court as follows:

1. Plaintiff Pena is a resident of the State of Texas, residing at 201 Lanier Ranch Rd., Driftwood, Texas 77619.
2. Defendant Payseur is a resident of the State of New York. Service of Summons and copy of this Complaint upon this Defendant may be obtained at The Satellite Bar, 6922 Harrisburg Blvd., Houston, Texas 77011.
3. Defendant Bayonet Records is a Limited Liability Company organized under the laws of the State of New York, at least partially owned by Defendant Payseur. Service of Summons and copy of this Complaint upon this Defendant may be obtained through the New York Secretary of

State, New York Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231.

4. This Court has jurisdiction over the claims for relief contained in this Complaint pursuant to 28 U.S.C. §1331 and 28 U.S.C §1367.

5. Venue is proper in the United States District Court for the Southern District of Texas, Houston Division pursuant to 28 U.S.C. §1400(a).

FACTS

6. This is a suit arising under the provisions of the U.S. Copyright Act 17 U.S.C. §101 *et seq.* The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and pendent State Law Claims.

7. Between 2009 and 2011 Plaintiff Pena and Defendant Payseur were members of a musical group called “Beach Fossils.” Beach Fossils is an unincorporated association of individual musicians formed in Brooklyn, New York in 2009.

8. While with the Beach Fossils, Plaintiff Pena and Defendant Payseur were “joint authors” (as that term is defined in 17 U.S.C. §101 and 17 U.S.C. §201) of musical compositions titled:

- A. “What A Pleasure”
- B. “Adversity”
- C. “Calyer”
- D. “Wide Awake;” and
- E. “Gathering”

9. While with the Beach Fossils, Plaintiff Pena was the sole author of a musical composition titled “Face It.”

10. The musical compositions identified in Paragraphs 8 and 9 supra, were embodied in sound recordings of the Beach Fossils titled “Beach Fossils” and “What A Pleasure” (the “Albums”) released in 2010 and 2011 respectively by Captured Tracks.

11. The musical composition “Face It” solely authored by Plaintiff Pena was released as a single by Captured Tracks in 2011.

12. Throughout the time Captured Tracks released and distributed the Albums, it was Plaintiff Pena’s understanding and belief that Defendant Payseur was the sole Beach Fossils member in contact with, as well as receiving any accountings or payments from, Captured Tracks and it was therefore Defendant Payseur’s duty to account to and pay any other writers and/or members of Beach Fossils for the Albums, including Plaintiff Pena.

13. Plaintiff Pena left Beach Fossils in 2011. After leaving Beach Fossils, Plaintiff Pena retained his exclusive rights conferred upon him by 17 U.S.C. §106. The sound recordings incorporating the musical compositions authored and jointly authored by Plaintiff Pena continue to be sold both in the United States and Internationally.

14. Since Plaintiff Pena left Beach Fossils in 2011, and in line with the fact that it was seemingly Defendant Payseur’s duty to account to the other writers/members of the Beach Fossils, Plaintiff Pena received a single payment from Defendant Payseur in the amount \$215.67 during April, 2018. Aside from that single payment, Plaintiff Pena has not been paid by Defendant Payseur any other sums from the sales of the records on which his compositions and sound recordings appeared.

15. On October 18, 2018, in an email sent to Plaintiff Pena Defendant Payseur’s attorney made an offer of \$20,000 as a “full buy-out of any of the underlying publishing copyrights in”

the six musical compositions: “Wide Awake,” “Gathering,” “What A Pleasure,” “Adversity,” “Calyer” and, “Face It.”

16. At that time Plaintiff Pena hired the Law Offices of Al Staehely to represent his interests in the negotiations going forward. On November 8, 2018 that office sent an email to Defendant Payseur’s attorney requesting contracts and/or licenses between the Beach Fossils and Captured Tracks; statements, invoices, receipts, check stubs, etc. from Captured Tracks related to income from the Albums; as well as any other relevant publishing/recordings/distribution/licensing/etc. agreements relating to the six musical compositions and sound recordings “Wide Awake,” “Gathering,” “What A Pleasure,” “Adversity,” “Calyer” and, “Face It,” in order to fully evaluate the legitimacy of \$20,000 offer made to Plaintiff Pena.

17. Repeated requests were made for these same documents, as well as during phone calls between Al Staehely and Defendant’s attorney, and to date, none of this material has been sent by Defendant or his attorney.

18. On November 23, 2018, Defendant Bayonet Records reissued the Albums “Beach Fossils” and “What A Pleasure.” These albums contain sound recordings of the musical compositions that were solely authored and jointly authored by Plaintiff.

19. In December 2018 Plaintiff Pena filed a United States Copyright Office Application for his sole authorship musical composition “Face It” which bears U.S. Copyright Registration Number PA0002165007.

20. In December 2018 Plaintiff Pena filed United States Copyright Office Applications on the musical compositions and sound recordings he jointly authored with Defendant Payseur. These applications bear the following file numbers:

- A. 1-7202307754: What A Pleasure; Adversity (Musical Compositions).
- B. 1-7202307550: Wide Awake; Gathering (Musical Compositions and Sound Recordings).
- C. 1-7202307808: Calyer (Musical Compositions and Sound Recordings)
- D. 1-7202307521: Adversity; What A Pleasure; Face It (Sound Recordings)

FIRST CLAIM FOR RELIEF

21. For his First Claim for Relief, Plaintiff Pena seeks remedies afforded by the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* This Act allows this Court declare the rights and other legal relations of parties in this litigation.

22. Plaintiff Pena seeks a judicial declaration from this Court that:

A. Pena is the joint author, along with Defendant Payseur of the following musical compositions:

- i. “What A Pleasure”
- ii. “Adversity”
- iii. “Calyer”
- iv. “Wide Awake,” and;
- v. “Gathering”

and that Defendant Payseur has no rights to these musical compositions above those rights conferred to him as a joint author under the Copyright Act.

B. Pena is the sole author of the musical composition “Face It” and that Defendant Payseur has no rights to this musical composition whatsoever.

C. Pena is joint author, along with Defendant Payseur, of the sound recordings “Wide Awake,” “Gathering,” “What A Pleasure,” “Adversity,” “Calyer” and, “Face It,” and that Defen-

dant Payseur has no rights to these sound recordings above those rights conferred to him as a joint author under the Copyright Act.

SECOND CLAIM FOR RELIEF

23. Without waiving the preceding claim for relief, Plaintiff Pena asserts that by failing to pay him any sums from the sales of the records on which his compositions and sound recordings appeared since he left Beach Fossils, Defendant Payseur has breached his agreement to pay Plaintiff these sums due and owing.

24. Plaintiff Pena asserts that the sums owed by Defendant Payseur to him are unliquidated but are estimated to exceed \$21,000.

25. All conditions precedent to Plaintiff's recovery have been performed.

26. It was necessary to secure the services of The Law Offices of Al Staehely, an attorney licensed to practice in the State of Texas, to enforce and protect the rights of Plaintiff in this case. As additional damages from Defendant, Plaintiff asserts that he should be awarded his reasonable and necessary attorney's fees, expenses, and costs incurred in this litigation.

THIRD CLAIM FOR RELIEF

27. Without waiving the preceding claims for relief, Plaintiff Pena asserts that he is entitled to an accounting of all sums received by Defendant Payseur from the sales of sound recordings containing his jointly authored as well as sole authored musical compositions since he ceased being a member of Beach Fossils. Plaintiff Pena is also entitled to an accounting from Defendant Bayonet Records of all sums it received from the sales of sound recordings containing his jointly authored as well as sole authored musical compositions that Defendant Bayonet Records re-released on Albums "Beach Fossils" and "What A Pleasure" in November, 2018.

28. Under the provisions of 17 USC §201, Plaintiff and Defendant, as joint authors, both hold independently the exclusive rights conferred by 17 U.S.C. §106. Along with these rights comes the duty to account. Defendant Payseur has abrogated his duty by failing to account. After repeated requests by Plaintiff Pena's attorney, Defendant Payseur has failed to provide Plaintiff Pena with label contracts, statements, and sales numbers for the initial issues of the Albums that are necessary to determine the amount owed by Defendant. After repeated requests by Plaintiff's attorney, 3 months after the initial request, Defendant Payseur has provided initial pressing numbers for the reissued Albums but has failed to account since their release in November 2018. Defendant Bayonet Records has failed to provide Plaintiff with any accounting information whatsoever.

29. Plaintiff requests this Court to Order Defendants to account. Alternatively, Plaintiff requests this Court to appoint an auditor to conduct the accounting of Defendants.

FOURTH CLAIM FOR RELIEF

30. Without waiving the preceding claims for relief, Plaintiff Pena asserts that Defendant Bayonet Records has committed copyright infringement of his musical composition "Face It."

31. Plaintiff Pena is the owner of a valid United States Copyright in the musical composition "Face It" which bears US Copyright Registration Number PA0002165007. Plaintiff is the sole author of this work.

32. In November, 2018 Defendant Bayonet Records re-released the album "What A Pleasure" which contains Plaintiff's musical composition "Face It" embodied in a sound recording. Defendant Bayonet Records has sold and distributed "What A Pleasure" nationwide, including within the Southern District of Texas.

33. Defendant Bayonet Records did not obtain Plaintiff Pena's consent to use his musical composition "Face It" prior to re-releasing the album "What A Pleasure." By failing to obtain the requisite license to use his musical composition "Face It," Defendant Bayonet Records has violated Plaintiff's exclusive rights afforded him under 17 U.S.C. §106.

34. As a remedy for Defendant Bayonet Records' copyright infringement, Plaintiff Pena seeks recovery of any and all damages to which he is entitled along with any additional profits received by Defendant Bayonet Records from infringement of Plaintiff's musical composition "Face It" as provided by 17 U.S.C. § 504(a)(1).

WHEREFORE, PREMISES CONSIDERED, John Pena, Plaintiff, prays that James Dustin Payseur, and Bayonet Records, Defendants, be summoned to appear and answer, and upon entry of Final Judgment that Plaintiff be awarded:

- A. Declaratory Relief as pled in this Complaint,
- B. Monetary damages to be determined by the trier of fact,
- C. All monetary damages and profits of Defendant Bayonet Records derived from its infringement of Plaintiff's musical composition "Face It."
- D. Reasonable and necessary attorney's fees, court costs, and litigation expenses,
- E. An accounting,
- F. Pre and Post Judgment interest at the maximum allowable rate, and;
- G. Any other relief, legal or equitable, to which Plaintiff shows himself justly entitled.

Respectfully submitted,

THE LAW OFFICE OF AL STAEHELY, JR.

A handwritten signature in black ink, appearing to read 'Al Stachely, Jr.', is written over a horizontal line.

Al Stachely, Jr.

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